

REMARKS

In the Final Office Action mailed on June 23, 2010, claims 1-3, 5-12, 14-21, and 25-33 were rejected.

In order to expedite prosecution, claim 31 has been amended to specify that the container recited therein is a monolayer container. Support for this claim amendment can be found in claim 3.

35 U.S.C. 103(a) Rejections

All of pending claims 1-3, 5-21, and 25-33 stand rejected under 35 U.S.C. 103(a) as being obvious over US 5,759,653 ("Collette").

1. Independent Claim 1

Independent claim 1 recites a method for making a container that is stable during unfilled storage and has a barrier layer with an oxygen scavenging property that is activated after filling the container with an aqueous fluid. In contrast, Collette teaches a multilayer container made from an oxygen scavenging material that is activated prior to filling the container with product.¹ Collette does not include any disclosure of a method for forming a container having an oxygen scavenging layer that is not already activated prior to product filling. Further support of Applicants' position is found in the Declaration of inventor Paul Share dated October 20, 2009, which was previously submitted.

In addition, claim 1 recites a process utilizing a preblend that includes 20-2,000 ppm of an oxygen scavenging material. Although the Final Office Action points to the passage appearing at col. 10, lines 24-37 of Collette as disclosing such a concentration, when considering the teachings of the reference as a whole, it is clear that this passage refers to the amount of catalyst in the first blend (which includes only

¹ That the Collette scavenger layer is already activated prior to product filling has been discussed extensively by Applicants on the record. See, e.g., Appendix "A" of Applicants' Response dated November 17, 2009, which lists passages of Collette that demonstrate that the Collette scavenger layer is activated prior to product filling.

1-10% masterbatch²). First, col .10, lines 24-37 generically refers to the concentration of catalyst in “each blend” and does not specifically reference the masterbatch. In fact, the only catalyst concentration Collette discloses in the context of the Collette masterbatch is 3,000 – 6,500 ppm.³ It would be inconsistent for the only disclosed masterbatch concentration (i.e., 3,000 – 6,500 ppm) to be outside of the preferred catalyst concentration of 50-1,000 ppm recited at col. 10, lines 24-37, let alone outside by such a large margin. The preferred catalyst range of 50-1,000 ppm, however, is entirely consistent with the first blend catalyst concentration of 250-500 ppm disclosed throughout Collette.⁴ It is possible that the Collette masterbatch catalyst concentration of 3,000-6,500 ppm may contribute to activation of the Collette scavenging material prior to product filling -- perhaps in combination with one or more other factors.⁵

Item 4(a) of the Final Office Action also asserts that “it is unclear why “activation” occurs at some different point in the claimed invention than in the Collette process” and implies that it is Applicants’ burden to explain the precise chemical mechanism responsible for activation of the Collette oxygen scavenging layer prior to product filling. Again, Applicants have no burden to explain why activation of the Collette oxygen scavenging layer occurs prior to filling of the Collette container.⁶ For the reasons already discussed extensively on the record, the Collette reference itself makes clear that the oxygen-scavenging layer of the multilayer Collette containers is already activated prior to product filling. Applicants have no duty to explain scientifically why this is so.

Thus, for the foregoing reasons, it is respectfully submitted that claims 1-3, 5-12, 14-21, 25-26, and 29-30 are neither anticipated nor rendered obvious by Collette.

² See the fourth paragraph of the Collette Summary.

³ See the fourth paragraph of the Collette Summary and claim 26.

⁴ See the fourth paragraph of the Collett Summary; col. 9, lines 64-65; and claim 27.

⁵ Some additional relevant factors may potentially include: the use of large amounts of post-consumer PET (which Collette teaches causes accelerated activation and includes a variety of contaminants) and/or the inclusion of substantial amounts of water in the Collette masterbatch (col. 5, lines 26-27 discloses that the masterbatch may have a moisture content above 2,500 ppm).

⁶ The Patent Office has not cited any case law or MPEP section that would establish that Applicants have any such burden.

2. Independent Claim 27

Independent claim 27 stands rejected as being obvious over Collette. It is respectfully submitted that independent claim 27 is allowable for the same reasons as discussed above with regards to independent claim 1. In particular, Collette teaches a method for forming a container having a scavenging layer that is inherently activated during production before filling and does not teach any method for forming a container that is not already activated prior to filling. Thus, Collette does not teach a method for forming a container that has the properties recited in clause (f) of claim 27. It is therefore submitted that independent claim 27 and dependent claim 28 are allowable over Collette.

3. Independent Claim 31

In order to expedite prosecution, claim 31 has been amended to recite that the container recited therein is a monolayer container.⁷ As already discussed at length on the record, Collette explicitly teaches that a multilayer design should be employed to protect the packaged products from contacting contaminants present in the core Collette scavenging layer. In addition, nowhere does Collette teach activation through filling. Rather, Collette teaches activation prior to product filling. Accordingly, it is respectfully submitted that amended claim 31 and associated dependant claim 32 are in condition for allowance.

⁷ Applicants reserve the right to file a continuing application in order to pursue a claim directed to the subject matter of claim 31 prior to this amendment.

CONCLUSION

In view of the foregoing, all of pending claims 1-3, 5-12, 14-21, and 25-33 are in condition for allowance. Reconsideration and prompt allowance of all pending claims is respectfully requested. The Commissioner is authorized to charge any additional fees associated with this paper or credit any overpayment to Deposit Account No. 50-2070.

Respectfully submitted,

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